ALICE THOMPSON

IBLA 96-539 Decided May 27, 1999

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying reconstructed Alaska Native allotment application AA-77488.

Affirmed.

1. Alaska: Native Allotments--Evidence: Presumptions--Evidence: Sufficiency

   A rebuttable presumption exists that officers of the Government charged with receipt of applications duly and properly discharged their duties with respect to such applications. Where a Native allotment applicant alleges that she timely made application for an allotment with officials of BIA, but the records of the Department fail to disclose receipt of an application, the applicant bears the affirmative burden of establishing, by a preponderance of the evidence, that the application in question was duly filed.

2. Alaska: Native Allotments

   The Alaska Native Allotment Act authorized the Department to allot up to 160 acres to individuals who were natives of Alaska and resided in the State of Alaska. An application is properly rejected where the record indicates that the applicant did not reside in the State at the time she claimed to have filed her application.

APPEARANCES: Alice Thompson, pro se; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Alice Thompson has appealed from the August 13, 1996, decision of the Alaska State Office, Bureau of Land Management (BLM), denying her reconstructed application for Native allotment AA-77488. The application was

rejected because it was not pending before the Department of the Interior on December 18, 1971, as required by the savings provision of the repeal statute (section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. ' 1617(a) (1994)) and because she did not reside in the State of Alaska when she claimed to have filed her original application.

Thompson filed her reconstructed Native allotment application (AA-77488) on December 13, 1994, pursuant to the Alaska Native Allotment Act of May 17, 1906 (Allotment Act), as amended, 43 U.S.C. '' 270-1 to 270-3 (1970). Section 18(a) of ANCSA, 43 U.S.C. ' 1617(a) (1994), repealed the Allotment Act, but contained a savings clause which allowed the processing of Native allotment applications "pending before the Department of the Interior on December 18, 1971."

Thompson's reconstructed application was for approximately 160 acres within secs. 30 and 31, T. 9 S., R. 56 W. and secs. 25 and 36, T. 9 S., R. 57 W., Seward Meridian. Thompson claimed use of the land in August of 1959, 1964, 1966, and 1969. She also claimed to have timely filed an application for a Native allotment in 1971 with the Bureau of Indian Affairs (BIA).

BLM rejected the reconstructed application, finding that there was no evidence that Thompson had filed an application in 1971 and that, even if the application had been timely filed, she did not meet the residency and eligibility requirements for filing an allotment application. BLM cited Thompson's own statements that in the fall of 1957 she moved to Eugene, Oregon, with her husband and that she resided and worked in Oregon and California from 1957 through 1978, returning to Alaska only for a "couple of summers." BLM noted that Thompson identified herself on a 1969 commercial fishing license application as a nonresident. Based on this information, BLM concluded that Thompson was not a resident of the State of Alaska in 1971 when she claimed to have filed her original application, and had not in fact been a resident since 1957. Therefore, BLM concluded that Thompson did not meet the residency requirement of 43 C.F.R. ' 2561.0-3. The decision also noted that, although BIA certified Thompson on December 9, 1994, as an Alaskan Native entitled to receive an allotment under the Allotment Act, that certification appeared to be in opposition to that agency's 1971 declaration of ineligibility.

Thompson provided a statement of reasons (SOR) with her notice of appeal and also submitted a supplemental statement of reasons (SSOR). In her SOR, Thompson contends that a May 21, 1971, letter to her from BIA stating that BIA could not file her application while she was a resident of California is proof that she had filed an application, because such a statement would not have been made unless BIA had received her application. She acknowledges that the BIA letter indicated that it was responding to her letter of April 26, 1971, and states that she is unable to explain the language of the BIA letter, unless she had made an inquiry as to the status of her application. She asks why she should be responsible for BIA losing her application.

Along with her SSOR, Thompson submitted a witness statement from her brother-in-law, Edward Brandon stating, in its entirety:

> In 1969, I Edward Brandon had discussed over the telephone with Alice Thompson the filing of her application. I had also sent her a pamphlet called "Public Lands Act of 1906", or something of that nature. We discussed this at various times with her as I knew she was interested in filing for a native allotment for her lands she used on Lake Aleknagik. She had applied for the land as far as I know because we discussed it again in 1971 because the time was running out. I understand she sent out a[n] application but had been turned down because of a residency requirement.

Thompson also disputes BLM's conclusion that she did not reside in the State of Alaska at the time she claimed to have filed her application. In support of her view she notes the various definitions of the word "reside" as found in the American College Dictionary and asserts that the correct definition of the word in this situation is either to "exist or be inherent," or "to rest or be vested, as powers, rights, etc." (SOR at 2.) She finds importance in the fact that the Allotment Act does not state that a person has to be a resident but has to be one who "resides in and is a native of Alaska."

She also argues that because she applied for her allotment prior to ANCSA, section 270-1 should not apply to her, and that her residence should be determined by 25 C.F.R. Chapter 1, Part 43h. (SSOR at 1.) Thompson quotes the definition of "Permanent Residence" from 25 C.F.R. ' 43h.1(k) to support her claim that her residence may have been in Alaska even though she was living in California in 1971. The definition states that

> "permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his permanent home. * * * A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home.

25 C.F.R. ' 43h.1(k).

In its answer, BLM asserts that the applicant for a Native allotment bears the ultimate burden of proof that she is entitled to an allotment and that Thompson has not borne that burden. It points out that Thompson has been unable to produce a copy of her allotment application and that BIA searched its files and found no record of receiving any application from Thompson. BLM maintains that, without corroboration, Thompson's assertion that she submitted an application in 1971 is self-serving. Furthermore, it submits that the corroboration Thompson claims for filing her application rests on a strained interpretation of the May 21, 1971, BIA letter, and on

Brandon's statement that he understood she had sent an application, but that it was turned down because of residency. (Answer at 6, 7.) BLM contends that a vague statement by a family member about a conversation in 1971 should not be treated as corroboration or evidence that Thompson had an application pending with the Department on December 18, 1971.

BLM also disputes Thompson's interpretation of the BIA's 1971 letter. It notes that the specific language was, "We cannot file your application while you are a resident of California" and contends that nothing was said about an application having been received and denied, but only that she was not qualified to file for an allotment. BLM asserts that this view is supported by the statement in the letter that it was responding to her letter and the fact that the letter makes no reference to receipt of an "application." (Answer at 7.)

In response to Thompson's argument that she resided in Alaska, BLM asserts that her own evidence shows she did not reside in Alaska in 1971 when she claimed to have filed an application. BLM also points out that Thompson has provided no evidence that she was even in Alaska that year and that BIA's May 21, 1971, letter was addressed to her in California. Furthermore, BLM contends that Thompson's explanation as to where she lived in the years beginning in 1959 shows that she has not resided in Alaska since 1959. BLM notes that the Allotment Act of 1906, as amended, specifically required that land would be allotted only to any Indian, Aleut, or Eskimo of full or mixed blood who resided in Alaska. BLM submits that, because Thompson did not reside in Alaska, she has failed to satisfy the statutory requirement, and that it accordingly properly rejected her reconstructed application. (Answer at 9.)

[1] The Allotment Act authorized the Secretary of the Interior to allot up to 160 acres of "vacant, unappropriated, and unreserved nonmineral land in Alaska, * * * to any Indian, Aleut, Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age." 43 U.S.C. ' 270-1 (1970) (emphasis added). As noted above, that Act was repealed by section 18 of ANCSA, 43 U.S.C. ' 1617 (1994), with a savings provision for applications pending before the Department on December 18, 1971. A Native allotment application is considered "pending before the Department" if it was filed in any bureau, division, or agency of the Department on or before December 18, 1971. See Ouzinkie Native Corp. v. Opheim, 83 IBLA 225, 228-29 (1984); Katmailand, Inc., 77 IBLA 347, 354 (1983). If an application was not pending before the Department on that date, BLM has no authority to grant it.

Under certain circumstances an application that was rejected prior to December 18, 1971, might be considered to have been pending before the Department on that date. However, an application must have actually been filed by that date to come within these circumstances. BLM determined that no application was pending before the Department on December 18, 1971, because it concluded there was no proof that Thompson had ever filed an application.

In the present case, there is no "time stamp" on Thompson's original application placed there by any bureau, agency, or division of the Department because no original application has been found in any Departmental records. When Thompson inquired about her Native allotment in May 1990, BIA was unable to find any application or documentary proof that she had an application pending at BIA before December 18, 1971. (June 8, 1990, letter from BIA to Thompson.) The record contains no affidavit by any other bureau, agency, or division officer attesting to the timely filing of an original application. The only evidence in support of timely filing is that provided by Thompson, consisting of a May 21, 1971, letter to her from BIA stating that it could not file her application while she was a resident of California, as well as the witness statement from Edward Brandon, quoted above.

We do not agree with Thompson's assertion that proof of her filing can be found in the fact that she was turned down by BIA in its May 21, 1971, letter. As BLM points out, the letter states that it was replying to Thompson's letter of April 26. BIA's letter explained the effect of a "super land freeze," which closed all public land in Alaska effective December 1968. It went on to state that a Native could file an application for an allotment if certain qualifications were met, including occupancy, but that BIA could not file her application while she was a resident of California. The letter stated that a pamphlet explaining the allotment program was enclosed. Although there is no pamphlet attached to the letter in the reconstructed file, there are copies of other documents that were attached. These documents provide general information on Native land allotments and explain how to mark and post the land and how to provide proof of use and occupancy. Finally, a sample Native Allotment application is attached. If Thompson had already submitted an application, it would not have been necessary to send her this information, especially a sample application form. 1/ Contrary to Thompson's claim, the fact that BIA provided this information supports the conclusion that she had inquired about filing an application but had not yet filed one.

Thompson has submitted a signed statement from Edward Brandon which says that he knew Thompson was interested in filing for an allotment for lands she used on Lake Aleknagik because they discussed it. However, Brandon does not state that he knew she filed an application, only that she had applied as far as he knew, and that he understood she had filed. Thus, his statement fails to establish that Thompson filed her application prior to December 18, 1971. See William Yurioff, 43 IBLA 14, 17 (1979). In any event, affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. See Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985); Heirs of Linda Anelon, 101 IBLA 333,

1/ Thompson acknowledges that she received a sample application form. (SOR at 3.)

337 (1988); John R. Wellborn, 87 IBLA 20 (1985); H.S. Rademacher, 58 IBLA 152, 156, 88 I.D. 873, 876 (1981). Such corroborating evidence is absent from the present record.

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983); see also Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976). Thus, it is presumed that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing. H.S. Rademacher, 58 IBLA at 155, 88 I.D. at 875. This is a "rebuttable presumption," which means that the burden of proof is shifted to the appellant to provide evidence that an application was made timely and thereby rebut the presumption of regularity. Thompson's submissions do not overcome the presumption in this appeal. Therefore, we affirm BLM's determination that there was no application pending in the Department on December 18, 1971.

We also do not believe that the evidence submitted by Thompson is sufficient to raise a question of fact as to whether her Native allotment application was filed prior to December 18, 1971, which must be resolved in a hearing, as required by the court in Pence v. Kleppe. 529 F.2d 135 (9th Cir. 1976). Brandon's statement does not state affirmatively that the application had been filed; nor does the BIA letter state that an application had been received or was rejected.

[2] However, even if we could disregard the foregoing, BLM's decision must also be affirmed as to Thompson's failure to fulfill the statutory residency requirement. As noted above, the Allotment Act gave the Secretary authority to allot land to individuals who were natives of Alaska and fulfilled other specified requirements, including that the individual resided in Alaska. While other portions of the Act were amended, the requirement that an individual reside in Alaska remained in place until the Act was repealed.

Thompson argues that section 270-1 should not apply to her because she applied for her allotment prior to ANCSA. Thompson misunderstands the nature of section 270-1, which was the codification of the portion of the Allotment Act that actually authorized the Native allotments. Thus, if that section does not apply to her, she cannot qualify for an allotment.

In support of her argument that she did reside in Alaska, Thompson quotes a definition of "Permanent Residence" from 25 C.F.R. ' 43h.1(k). The regulation she cites was promulgated in 1972 and pertained to the preparation of a roll of Alaska Natives pursuant to section 5 of ANCSA (43 U.S.C. ' 1604 (1994)), which required the Secretary of the Interior to prepare, within 2 years from the date of enactment of the Act, a roll of Natives, showing which region the Native resided in on the date of the

1970 census. 2/ The regulation and definition cited by Thompson postdate the Allotment Act and thus do not apply.

The Allotment Act authorized the Secretary to allot land to any Indian or Eskimo who lived in Alaska. On numerous occasions we have noted that the statute requires that an individual be both a resident and a Native. Bella Noya, 42 IBLA 59 (1979); Norman Opheim, 41 IBLA 338 (1979); Herman Anderson, Jr., 41 IBLA 296 (1979). Although Thompson is a Native, the record is clear that she did not reside in Alaska in 1971.

Thompson left the State in 1959 to further her education and never returned to live in the State. The record contains a 1969 commercial fishing license application on which she identified herself as a nonresident and gave a California address; her 1969 report to the Alaska Department of Revenue on the amount paid for commercial fish products which showed a California address; and the 1971 BIA letter which was addressed to her in California. The file also contains an August 4, 1994, affidavit by Thompson, as well as a letter dated October 31, 1994, to Bristol Bay Native Corporation Realty Office recounting her use of the land and the time she spent in Alaska. The affidavit and letter show that she first moved to Oregon in 1958 with her husband, returned to Alaska in 1959 only to return to Oregon that same year where she was divorced and then remarried in 1961. She stated that she used the land she has applied for in August of 1964 and 1966 for berry picking and swimming. (Affidavit at 1.) However, each year she had returned to Oregon to continue her education. In 1967, she was divorced and moved to California because of the job opportunities and because the state required no tuition. (Affidavit at 2, October 1994 letter at 2.) She returned to Alaska in the summer of 1968 and used the land, and in the spring and summer of 1969 to work. That summer she staked the land she wanted to claim. However, after that she did not return to Alaska. This conclusion is supported by a May 23, 1990, letter Thompson sent to BIA regarding her allotment application. In that letter she describes in general terms her use of the land prior to 1969, but mentions no use after that. Nor is there any mention of a return to Alaska in any other document in the case record.

Thus, Thompson's own evidence shows that she did not reside in the State at any time during the year she asserts she filed her application, and that she did not even visit the State. It appears that she actually established residency in California in order to take advantage of California's free college tuition policy for residents. (Affidavit at 2, October 1994 letter at 2.) Having left Alaska and to all appearances

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2/ The regulation was redesignated as 25 C.F.R. Part 69 in 1981. 46 Fed. Reg. 13327 (Mar. 30, 1981). It contained the procedural rules governing the preparation of a roll of Alaska Natives under ANCSA. As the application and appeals process for preparing the roll was completed in 1981, the rule was no longer needed and was removed from the Code of Federal Regulations in 1988 as obsolete. 53 Fed. Reg. 21996 (June 13, 1988).

having established residency in California, we do not accept her present assertion that her legal residence was in Alaska. Therefore, BLM's decision that she did not reside in Alaska and therefore, even if she had timely submitted an application, she failed to fulfill the statutory requirement of residency, must be upheld. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge

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3/ Thompson also contends that she fulfilled the requirement of 5 years of substantially continuous use and occupancy of the land. However, because BLM made no decision on use and occupancy of the land, it is unnecessary to reach that issue.